Supreme Court, U.S.
FILED
JUN 5 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION, *Petitioner*

v.

HAROLD BROWN, et al., *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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June, 1978

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* of the Equal Employment Advisory Council ("EEAC") is submitted pursuant to the written consent of all parties.[1] EEAC is a voluntary nonprofit association organized as a corporation under the laws of the District of Columbia to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and in-

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[1] Their consents have been filed with the Clerk of the Court.

dustry associations whose employer-members have a common interest in the foregoing purpose. Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and Presidential Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended 32 Fed. Reg. 14302 (1967), 3 C.F.R. § 169.

Pursuant to Executive Order 11246, and regulations promulgated by the Secretary of Labor, 41 C.F.R. §§ 60-1.1, *et seq.*, the petitioner, EEAC members generally and thousands of others [2] are required as government contractors to prepare and either to make available for government inspection or to file with the government Affirmative Action Plans ("AAPs") and Employment Information Reports EEO-1 ("EEO-1 reports"), setting forth very detailed information on present and projected employment and promotions both for the employers' total work force and separately for women and minority group members. Thus EEAC members have a direct interest in the issues presented for the Court's consideration. Of particular concern to EEAC are the questions of the rights of private submitters of information to the federal government to protect their interests in the confidentiality of that data, and of the applicable standards governing disclosure of equal employment opportunity material compiled by private employers but in the possession of government

[2] The Department of Labor has estimated that there are more than 275,000 federal non-construction contractors subject to its Executive Order 11246 and that the number would be even higher if federal construction contractors were included. *See* General Accounting Office Report, "The Equal Employment Opportunity Program for Federal Nonconstruction Contractors Can Be Improved," FAO MWD-75-63 at 31-32 (April 29, 1975).

agencies. EEAC believes that the Court of Appeals' decision would inhibit the successful implementation of the affirmative action program under Executive Order 11246 which requires the voluntary cooperation of private employers.

SUMMARY OF ARGUMENT

I.

The privately generated information at issue in this case includes extremely detailed breakdowns of an employer's work force both by total employees and separately for females and minority groups. Numerous District Courts have found that this information is regarded as private or confidential commercial information by the parties that generate it. These District Courts have also found that public disclosure of such information would create a substantial risk of serious competitive harm to the employer. In some cases, it has been found that, since the data often include not only names, job titles and salaries but also employer evaluations and predictions as to the prospects for promotion, public disclosure would constitute a clearly unwarranted invasion of the privacy of employees.

We believe that the Third Circuit erred in holding that agencies such as OFCCP have virtually unbridled discretion publicly to disclose such data. Both the courts and Congress have long been sensitive to the need to protect private confidential data from public disclosure. Section 1905 of the Criminal Code prohibits disclosure of confidential financial or commercial information except as otherwise "authorized by law."

The Third Circuit erred in finding that disclosure was "authorized by law" for Section 1905 purposes.

The Freedom of Information Act, 5 U.S.C. § 552, does not compel, encourage, or authorize disclosure of information which falls within the exemptions to that Act. Indeed, when it adopted the (b)(4) exemption, Congress intended to "assure" the confidentiality of private commercial information. The Third Circuit also erred in holding that the so-called housekeeping statute, 5 U.S.C. § 301, permits the adoption of regulations that would constitute the requisite "authorized by law" for purposes of the criminal statute. Moreover, since the regulation relied upon by the Third Circuit does not even purport to be adopted pursuant to Section 301, and clearly was intended to be no more than an interpretive statement regarding general agency policy under the Freedom of Information Act, it was error for the Third Circuit to give the regulation substantive significance.

II.

Even if the Third Circuit were correct in its views as to agency authority to disclose, it erred in failing to articulate any standards for the exercise of that discretionary authority. The congressional purpose of protecting the confidentiality of privately generated confidential information must be given considerable weight. The (b)(4) exemption to the FOIA, as well as the (b)(3) and (b)(6) exemptions, are different from those other exemptions which are intended solely for the benefit of government agencies and therefore are subject to ready waiver by those agencies.

Here there is no strong policy consideration weighing in favor of disclosure. Indeed, the nature of the underlying regulatory program militates against disclosure. That regulatory program is dependent to a

considerable degree upon the willingness of employers to engage in critical self-evaluation of their utilization of female and minority group members and to impose upon themselves goals and timetables to achieve more effective utilization of those groups. Indiscriminate public disclosure can only deter harsh self-evaluation, thereby undercutting the voluntary appraisal scheme of the Executive Order.

III.

The Court should recognize that private suppliers of information not only have a cause of action to prevent threatened disclosure but also are entitled to *de novo* determinations on the relevant issues. Agencies by and large have little or no expertise regarding the issues posed by so-called "reverse FOIA" claims. Because agency determinations are made under the stringent time limitations of the FOIA and because suppliers of information frequently have little or no opportunity to participate in those hurried proceedings, the agency rarely, if ever, will compile an adequate record for adjudication of reverse FOIA claims.

ARGUMENT

I. THE RELEVANT STATUTES DICTATE THAT THE GOVERNMENT NOT DISCLOSE, WITH RARE EXCEPTIONS NOT RELEVANT HERE, THE CONFIDENTIAL FINANCIAL AND COMMERCIAL INFORMATION AND TRADE SECRETS OF PRIVATE PARTIES.

The District Court found, on the basis of an evidentiary record which it developed in the course of an adversarial hearing, that the petitioner's information in its AAPs was confidential financial or commercial information within the meaning of 18 U.S.C. § 1905,

and the (b)(4) exemption to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.[3]

Indeed, the District Court reached this finding even though it adopted the very restricted definition of confidential financial and commercial information for (b)(4) exemption purposes previously articulated by the Court of Appeals for the D.C. Circuit: Not only must there be proof that the information provider treats the data confidentially, there must also be proof that disclosure would either create a serious likelihood of substantial competitive harm or be likely to impair the

[3] 18 U.S.C. § 1905 provides:

> Whoever, being an officer or employee of the United States or any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

Subsection (b) of the FOIA, 5 U.S.C. § 552(b), provides in pertinent part that:

> "(b) This section does not apply to matters that are—
>
> • • •
>
> (3) specifically exempted from disclosure by statute (other than section 552(b) of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential."

Government's ability to collect such information in the future. 412 F. Supp. at 176; *see National Parks and Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).[4]

In reversing, the Third Circuit did not overturn the District Court's findings as clearly erroneous or otherwise improper. Rather, it effectively rendered the District Court's findings superfluous by holding that (1) the executive branch of the Government has broad if not totally unfettered discretion to destroy the confidentiality of information it collects from private parties and (2) the courts may not hear, *de novo*, the claims of private parties that (a) the information which they have supplied to the government falls in the category of confidential financial or commercial information or trade secrets and (b) threatened dis-

[4] The District Court's findings detail various ways in which competitive harm would occur. *See* 412 F. Supp. at 173, 176, 177. Other trial courts after similar evidentiary hearings have made comparable findings of fact, delineating various ways in which competitive harm is likely to occur in the case of other industries. *E.g.*, Westinghouse Electric Corp. v. Schlesinger, 392 F. Supp. 1246 (E.D. Va. 1974), and United States Steel Co. v. Schlesinger, 8 EPD ¶ 9717 (E.D. Va. 1974), *both aff'd*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977). Some courts have also found that disclosure of at least some portions of the AAPs would constitute a "clearly unwarranted invasion of personal privacy" for the contractor's employees within the meaning of Section 552(b)(6). *E.g.*, Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. 150 (D.D.C. 1976), *cert. before judgment denied*, 431 U.S. 924 (1977), *appeal pending sub nom.* National Organization for Women v. Social Security Administration, Nos. 77-1270, *et al.* (D.C. Cir., docketed March 15, 1977). Although that question was apparently not pressed below, the potential for invasion of personal privacy is a factor which should not be overlooked in assessing the soundness of the Third Circuit's broad holding that there is virtually unlimited discretion to release such information to anyone.

closure, under the particular circumstances of any given case, is improper.

We believe the Court of Appeals erred in both its substantive and procedural conclusions. On the substantive level, the Third Circuit simply ignored the long tradition, found in both the common law,[5] and in numerous statutes,[6] of protecting the confidentiality of commercially valuable private information. And while 18 U.S.C. § 1905 contains an exception for disclosure otherwise "authorized by law," the Third Circuit's approach has the effect of turning the exception into the general rule.

A. The Freedom Of Information Act Does Not Authorize Disclosure Of Exempt Information Falling Within Section 1905.

Given the District Court's uncontroverted finding that the information falls within the (b)(4) exemption to the FOIA, that statute provides no basis for an agency decision or regulation that would be "authorized by law" for Section 1905 purposes.

Although the various exemptions to the Freedom of Information Act, *standing alone,* may not necessarily

[5] See, *e.g.*, Board of Trade of City of Chicago v. Christie Grain & Stock Co., 198 U.S. 235 (1905); Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 644 (1868); Note, Nature of Trade Secrets and and Their Protection; 42 Harv. L. Rev. 254 (1928).

[6] *E.g.*, 42 U.S.C. §§ 2000e-5(b), 2000e-8(e) (Equal Employment Opportunity Commission); 13 U.S.C. § 9(a) (Census Bureau); 26 U.S.C. §§ 6103, 7213 (Internal Revenue Service). Of course, since the Office of Federal Contract Compliance Programs ("OFCCP," formerly OFCC) was created by executive order rather than by statute, 18 U.S.C. § 1905 must looked to rather than a statute dealing specifically with the agency in question.

compel nondisclosure,[7] by the same token the FOIA cannot be read as authorizing or even encouraging disclosure of all of the information to which that Act by its own words "does not apply . . . ." 5 U.S.C. § 552(b). While there may be a congressional desire to have the exemptions construed narrowly, there is no congressional policy mandating disclosure of exempt material. The FOIA is at most "neutral" insofar as information to which it "does not apply" is concerned. *Charles River Park "A," Inc.* v. *Department of Housing and Urban Development,* 519 F.2d 935, 942 (D.C. Cir. 1975).

Indeed, the (b)(4) exemption was adopted to continue the long-standing tradition that the confidentiality of competitively sensitive private information should be protected.[8] Congress expected by means of the (b)(4) exemption to "assure" the confidentiality of such information. The House Government Operations Committee Report accompanying the FOIA explained that the (b)(4) exemption

> "would *assure* the confidentiality of information obtained by the Government through questionnaires or through material submitted and disclosures made in procedures such as the mediation of labor-management controversies. It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government. . . . It would also include information which is given to an agency in confidence,

[7] EPA v. Mink, 410 U.S. 73, 80 (1973). *See also* FAA Administrator v. Robertson, 422 U.S. 225, 262, 269 n.1 (1975); Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976).

[8] *See* J. O'Reilly, Federal Information Disclosure § 14.01 (1977). *See also* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974).

since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations." (Emphasis added.)[9]

As a representative of the Justice Department, testifying at hearings on the predecessor of the bill which became the FOIA, put it,

> "not only as a matter of fairness, but *as a matter of right,* and as a matter basic to our free enterprise system, *private business information should be afforded appropriate protection,* at least from competitors." (Emphasis added.)[10]

This legislative history clearly indicates that the expressed concern for the goal of freedom of access to government information was not regarded as inconsistent with or an abridgement upon the traditional policies of protecting the confidentiality of privately generated information. Similarly, Congress strove through the (b)(6) exemption to preserve personal privacy without unnecessarily compromising the basic purpose of the FOIA to ensure openness in Government.[11]

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[9] H.R. Rep. No. 1497, 89th Cong., ~~1st~~ 2nd Sess. 10 (1966). *See also* S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

[10] Hearings on S. 1666 Before the Subcommittee On Administrative Practice and Procedures of the Senate Committee On the Judiciary, 88th Cong., 1st Sess. 199 (1964). *See also id.* at 174; S. Rep. No. 813, *supra,* at 342-43.

[11] *See, e.g.,* S. Rep. No. 813, *supra* at 9 (the (b)(6) exemption "will involve a balancing of interests between the protection of an individual's right of privacy and the preservation of the public's right to Government information"); H.R. Rep. No. 1497, *supra,* at

B. The Third Circuit Erred In Holding That 5 U.S.C. § 301 Authorizes Executive Agencies To Exempt Themselves From The Nondisclosure Policy Of 18 U.S.C. § 1905.

The Third Circuit concluded that 5 U.S.C. § 301,[12] the so-called housekeeping statute, gives Federal agencies the power to overcome the nondisclosure policy of 18 U.S.C. § 1905. This reading of 5 U.S.C. § 301 renders 18 U.S.C. § 1905 meaningless, except in cases involving insubordination within an agency—that is, cases in which an agency employee violates an agency regulation or disregards a superior's *ad hoc* decision not to disclose. At least prior to *Sears, Roebuck & Co.* v. *Eckerd,* 17 FEP Cases 436 (7th Cir., April 25, 1978), which merely follows the decision below and carries it to its logical extreme, there has been no decision either here or by any lower court suggesting that in view of Section 301, 18 U.S.C. § 1905 was designed merely to punish insubordination.

That view is clearly incorrect. Section 301 does not authorize any "disclosure"; rather it provides only for the "custody, use, and preservation" of papers and records. 18 U.S.C. § 1905 applies to *any* officer or employee of the United States, not merely subordinate officers and employees who disobey agency rules or the

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11 ("Sixth Exemption [excludes] those hundreds of files the disclosure of which might harm the individual"). *See also* Department of the Air Force v. Rose, 425 U.S. 352 (1976).

[12] 5 U.S.C. § 301 provides:

> "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

decisions of their superiors. Numerous agency regulations, some of which have been in existence in one form or another for many years, treat 18 U.S.C. § 1905 as imposing substantive limitations on what the agency may do, not merely penalizing unauthorized deviations from what an agency has decided to do.[13] If Congress cared so little for protecting the confidentiality of privately supplied information that it intended agencies to have carte blanche under Section 301 to destroy that confidentiality, it would make little sense to create a criminal deterrent to violations of confidentiality by agency subordinates. *Cf. Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d 1190, 1215 (4th Cir. 1976), *cert. denied,* 431 U.S. 924 (1977).

The legislative history of the most recent amendment of Section 301 indicates that that provision was *not* intended to authorize regulations that would preclude application of Section 1905. In 1958 Congressman Moss was disturbed to find that Section 301, which he perceived as merely "a simple grant of housekeeping authority," had been relied on by several agencies as an independent justification for *withholding* information. To cure this misuse of Section 301, he proposed what ultimately became the statute's second sentence. 104 Cong. Rec. 6549 (daily ed. April 16, 1958).[14] In explaining the limited purpose of his "very simple amendment to a very old statute," Congressman Moss said that his amendment would not affect any other statutory authority which gave an agency the right to withhold information, *id.* at 6549, 6564; that it would merely restore the original intent of Section 301 so that agencies would stop using it as an independent basis for nondisclosure, *id.* at 6550; and, most importantly, that it

> "does not affect the confidential status of information given to the Government and carefully detailed in Title 18, United States Code, section 1905, such as trade secrets, processes, operations, style of work, or apparatus or the identity of confidential statistical data, amount or source of income, profit, loss, or expenditures." *Id.* at 6550.

Believing that broader issues relating to disclosure of information in the hands of the government should receive more thorough consideration at a later time, Congressman Moss successfully opposed all attempts to restrict or expand the scope of the amendment. *See id.* at 6550, 6567-75. He intended only the specific goal of preventing agencies from using Section 301 as an independent grant of authority to control disclosure of information from the public. Congress did not believe that Section 301 authorized *either* release or withholding records, and it acted to clarify the statute on that

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[13] *See, e.g.,* 29 C.F.R. § 70.21(a) (Department of Labor); 32 C.F.R. § 286.4(b) (Department of Defense); 32 C.F.R. § 1285.3 (d)(2)(iii)(c) (Defense Logistics Agency); 40 C.F.R. § 2.201(e) (Environmental Protection Agency); 47 C.F.R. § 0.457(c)(5) (Federal Communications Commission); 49 C.F.R. § 7.67(a)(1) (Department of Transportation).

[14] At the time Congressman Moss was Chairman of the Special Public Information Subcommittee of the House Committee on Government Operations and was later to be the principal sponsor and leading House advocate of the FOIA as Chairman of the House Government Operations Committee. *See* Ginsburg, Feldman & Bress v. FEA, No. 76-1759 (D.C. Cir., February 14, 1978) Slip Op. at 13 & n.10, (*vacated and reargued en banc,* April 6, 1978), detailing Congressman Moss' expertise on government information matters and his contribution to passage of the FOIA.

latter point because that was the way in which Section 301 was then being misused.[15]

The District of Columbia Circuit correctly concluded in *Charles River Park,* on the basis of a careful analysis of the legislative history, that Section 301 did not authorize regulations that would override the nondisclosure policy of Section 1905.[16] The Third Circuit

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[15] The legislative history shows that Congressman Moss endorsed the following statement:

> "I believe there is unanimous sentiment in the Government Operations Committee on the following points:
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> • • •
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> "2. That . . . [5 U.S.C. § 301] merely authorized department heads to make regulations governing day-to-day operation of the department—a so-called housekeeping function; and that section 161 of the Revised Statutes [*5 U.S.C. § 301*] *was not intended to deal with the authority to release or withhold information or records.*
>
> "3. That departments henceforth should be prevented from relying upon section 161 of the Revised Statutes [5 U.S.C. § 301] as authority for denying access to records or information, but that authority derived from any other sources, such as the Constitution, statutes, or Executive Orders, to withhold information or limit the availability of records would not in any way be affected by the language of H.R. 2767 [the Moss amendment]." *Id.* at 6562 (emphasis and bracketed material added).

[16] 519 F.2d at 942-43. *Accord,* Westinghouse Electric Corp. v. Schlesinger, *supra,* 542 F.2d at 1203; Parkridge Hospital, Inc. v. Blue Cross & Blue Shield of Tennessee, 430 F.Supp. 1093 (E.D. Tenn. 1977); Metropolitan Life Ins. Co. v. Usery, *supra,* 426 F. Supp. at 170; Babcock & Wilcox Co. v. Rumsfeld, 70 F.R.D. 595, 601 (N.D. Ohio 1976); Holiday Inns, Inc. v. Kleppe, 13 FEP Cases 1337, 1339 (W.D. Tenn. 1976). Sears Roebuck & Co. v. Eckerd, 17 FEP Cases 436 (7th Cir., April 25, 1978), and General Dynamics Corp. v. Marshall, 16 FEP Cases 898 (8th Cir., February 14, 1978) rely basically on the Third Circuit opinion in holding that Section 301 authorizes regulations which preclude application of Section 1905. One subsequent lower court decision,

criticizes the *Charles River Park* conclusion, but fails to offer any basis for its contrary assertion that since 1789 Section 301 and its predecessors authorized disclosures otherwise prohibited by Section 1905 and its predecessor statutes. 565 F.2d at 1187. Absent some clear indication that Congress's 1958 perception of Section 301 was wrong, the Third Circuit's assertion must be rejected.

Construing Section 301 as authorizing disclosures that would otherwise be in contravention of 18 U.S.C. § 1905 would also be inconsistent with the FOIA. Section 301 provides no guidelines for the exercise of agency discretion whether or not to disclose. Yet in the FOIA, Congress took the trouble to delineate for government officials and the courts very extensive criteria for differentiating between information subject to mandatory disclosure and information not subject to such disclosure. 18 U.S.C. § 1905, along with most if not all of the other nondisclosure statutes, is cast in rather precise terms as to the type of information involved and

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Westinghouse Electric Corp. v. Brown, 443 F. Supp. 1225, 1223 n.5 (E.D. Va. 1977), expressly rejects the Third Circuit's view.

The attempt in *Eckerd* to distinguish 41 Op. Att. Gen. 221 (1955) is as unconvincing as is that court's ignoring of 41 Op. Att. Gen. 166 (1953). In both Opinions the Attorney General found it necessary to find some statutory basis other than the general housekeeping statute in order to render the proposed disclosure "authorized by law" for Section 1905 purposes. Furthermore, Senator Aldrich's remark about "poorly paid revenue agents" is misconstrued in *Eckerd.* The Senator's remarks were directed to the dangers of permitting inspection of company records that would expose valuable trade secrets and formulas, not to the scope of the criminal statute which would punish divulging that information once it had fallen into government hands. 26 Cong. Rec. 6893 (June 27, 1894).

how it is to be handled. One must attribute quite irrational conduct on the part of Congress to hold, as the Third Circuit apparently did, that in all or virtually all the statutes relating to disclosure save one—5 U.S.C. § 301—Congress chose to write with a fine point, but that in Section 301 Congress simply was throwing up its hands and allowing agencies free rein to disclose information whenever and wherever they were of a mind to do so.

To support its curious view, the Third Circuit cites only two decisions, both of which it rendered. *Westinghouse Electric Corp.* v. *Nuclear Regulatory Commission,* 555 F.2d 82 (3rd Cir. 1977); *Non-Resident Taxpayers Ass'n* v. *Municipality of Philadelphia,* 478 F.2d 456 (3rd Cir. 1973). The Third Circuit's view in the instant case and in its *Westinghouse* decision seems predicated on the general notion that any valid regulation has the "force of law" and therefore suffices as an "authorized by law" for Section 1905 purposes. This analysis merely obscures the real issue: whether Congress intended by Section 301 to give government officials unfettered discretion to do that which Congress made it a crime for them to do in Section 1905. The view that Congress intended an open-ended delegation of authority for agencies to decide when a criminal statute would apply finds no support in either common sense or in the decisions of this Court.[17] Moreover,

[17] The "authorized by law" exception of Section 1905 and its predecessors has been satisfied only by Congressional statute, the Federal Rules of Civil Procedure, and judicial or quasi-judicial process—never before by an executive pronouncement. *See, e.g.,* Blair v. Oesterlein Co., 275 U.S. 220, 227 (1927) (subpoena of the Board of Tax Appeals requiring Commissioner to answer interrogatories and to furnish tax information concerning several corporations satisfied "authorized by law" exception to predecessor of Section 1905); United States v. Dicke, 268 U.S. 378 (1925) (Section 257(b) of the Revenue Act of June 2, 1924, which directed Commissioner to publicize lists of taxpayers and amount of tax paid, was a "law" within meaning of R.S. § 3167, which prohibited disclosure of tax information in any manner not provided by law); Consumers Union, Inc. v. Cost of Living Council, 491 F.2d 1396 (T.E.C.A.), *cert. denied sub nom.* Business Roundtable v. Consumers Union, 416 U.S. 984 (1974). (Section 205(b)(3) of the Economic Stabilization Act, prohibiting disclosure of proprietary information filed with the CLC by business and authorizing CLC to disclose nonproprietary information, protected CLC from Section 1905 penalties, since Section 1905's application was expressly limited by the Act); Exchange National Bank v. Abramson, 295 F. Supp. 87 (D. Minn. 1969) (information discoverable pursuant to Federal Rules of Civil Procedure not prevented by Section 1905 from being disclosed); Pleasant Hill Bank v. United States, 58 F.R.D. 97 (W.D. Mo. 1973) (any information discoverable under Federal Rules of Civil Procedure cannot be confidential information under Section 1905). 41 Op. Att. Gen. 221 (1955) (Section 1905 does not prevent FCC from providing information to Congress, since Legislative Reorganization Act of 1946 empowers Senate Committee to require the production of documents).

Non-Resident Taxpayers, since it does not even discuss Section 1905, is hardly of much assistance in reaching the goal ought by the court below. *See Charles River Park, supra,* 519 F.2d at 942 n.9.

C. Even If The Third Circuit's Expansive View Of Section 301 Were Sound, The OFCCP's So-called Disclosure Regulations Cannot Constitute The Requisite "Authorized By Law" For Section 1905 Purposes Since Those Regulations Do Not Even Purport To Invoke Section 301 Or To Authorize Disclosure Of Information Within 18 U.S.C. § 1905.

After concluding that Section 301 *could* permit agencies to write regulations that would constitute an "authorized by law" for Section 1905 purposes, the Third Circuit went on to assert, without any supporting analysis, that the OFCCP's disclosure regulations "are valid under § 301." 656 F.2d at 1187-88. This assertion is unjustified.

The OFCCP's so-called disclosure regulations, 41 C.F.R. Part 60-40, cite as their only basis the FOIA and Executive Order 11246. The regulations, moreover, were adopted without notice of proposed rule making and an opportunity for comment pursuant to the APA requirements for the adoption of substantive rules. *See* 5 U.S.C. § 553. The statement of purpose justifies this lack of notice and comment by stating that the regulations "relate solely to interpretive rules, general statements of policy, and to rules of agency procedure and practice," a clear indication that the rules were intended merely to implement the FOIA, not carve out some new substantive rules governing disclosure of information falling outside the scope of the FOIA. Subsection 552(a)(3) provides that

> "each agency, upon any request for records which (A) reasonably describes such records and (B) is made *in accordance with published rules stating the time, place, fees (if any), and procedures to be followed,* shall make the records promptly available to any person." (Emphasis added.)

Pursuant to this statutory directive, roughly 114 separate "agencies" have published regulations describing how they will attempt to implement and apply the FOIA in their respective areas of responsibility.[18] Many of these regulations contain a provision comparable to 41 C.F.R. § 60-40.2(a) upon which the Third Circuit placed such great reliance, reciting an agency intention not to invoke the exemptions from mandatory

[18] For a detailed list of the citations to these various FOIA interpretive regulations, see C. Marwick (ed.), Litigation Under the Amended Federal Freedom of Information Act, App. at 32-34 (3d ed. 1977).

disclosure at each and every opportunity to do so. These promises not to make undue use of the FOIA exemptions—several of which are intended solely for the benefit of the agency and thus obviously within its authority to waive—are a far cry from a deliberate agency decision to invoke an arcane housekeeping statute for the purpose of indiscriminately disclosing confidential information which the agency collects from private parties.

As for the reference to the Executive Order in the statement of purpose, *see* 38 Fed. Reg. 3192 (February 2, 1973), it is no more than a simple mention in passing: No attempt was made to show how the so-called disclosure regulations would effectuate any of the purposes of the Executive Order.[19]

Accordingly, it seems quite clear that 5 U.S.C. § 301 cannot be relied upon as justifying the sweeping significance given to the OFCCP regulations by the Third Circuit. An agency is bound by its own statement of purpose at the time it purports to adopt regulations.[20] Thus even if Section 301 *could* authorize adoption of sweeping disclosure regulations, it cannot be said that the present regulations *were* adopted pursuant to that

[19] Section 201 of the Executive Order grants the Secretary of Labor the power to adopt rules and regulations necessary and appropriate to achieve the purposes of the Order. The reference to the Executive Order in the statement of purpose accompanying the Part 60-40 regulations thus seems clearly to have been intended only as a justification for the particular agency's right to have its rules published in the Federal Register—not as a substantive basis for the actual rules adopted.

[20] *E.g.*, Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962); SEC v. Chenery Corp., 332 U.S. 194, 196 (1946); *see generally* K. Davis, Administrative Law of the Seventies, § 5.03 at 147-48 (1976).

authority. The OFCCP regulations are mere interpretive regulations that do not have the force of law that can only be attributed to valid regulations that are adopted after notice and opportunity for comment.[21]

There are still other problems with attributing the substantive significance to the OFCCP regulations that the Third Circuit attempts to attribute to them. The OFCCP and the Compliance Agencies which report to it operate under authority delegated to them by the Secretary of Labor pursuant to Executive Order 11246. The Department of Labor also has FOIA disclosure regulations, 29 C.F.R. Part 70, which the OFCCP disclosure regulations by their own terms are merely designed to supplement. *See* 41 C.F.R. § 60-40.1. Yet the Department of Labor disclosure regulations specifically forbid release of information within the scope of Section 1905. 29 C.F.R. § 70.21(a). *See Westinghouse Electric Corp.* v. *Schlesinger, supra,* 542 F.2d at 1203 & n. 36. The Department's regulations also make it quite clear that the (b)(4) exemption is for the benefit of private parties, not the agency, and was intended by Congress to *assure* confidentiality, thus giving information within that exemption quite a different character from information within exemptions the agency could freely waive. Moreover, even the OFCCP regulations do not allow disclosure "in the case of records disclosure of which is prohibited by law." 41 C.F.R. § 60-40.2(a).[22]

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[21] Morton v. Ruiz, 415 U.S. 199, 236 (1974); United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655, 674 (1973); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[22] The regulations of the Defense Supply Agency (now the Defense Logistics Agency) are also pertinent, particularly since it was the decision of that agency and that agency alone that precipitated the instant case. The DSA regulations, like the Department of Labor's, specifically forbid disclosure of information falling within Section 1905. *See* 32 C.F.R. § 1285.3(d)(2)(iii)(*c*).

In view of these factors, it was erroneous for the Third Circuit to hold that the OFCCP regulations, and particularly 41 C.F.R. § 60-40.2(a), invoke the obscure residual statutory authority the Third Circuit purported to find for overriding 18 U.S.C. § 1905. The mere fact that the OFCCP regulations leave room not to assert every exemption from mandatory disclosure cannot be taken as an expression of agency intent to exercise residual authority to disclose information that traditionally is protected from public disclosure by the government.

II. EVEN IF GOVERNMENT OFFICIALS HAVE SOME RESIDUAL AUTHORITY WHICH PERMITS THEM TO DISCLOSE THE CONFIDENTIAL FINANCIAL AND COMMERCIAL INFORMATION OF PRIVATE PARTIES THAT IS EXEMPT FROM MANDATORY DISCLOSURE, SOME GUIDELINES FOR THE EXERCISE OF THAT AUTHORITY SHOULD BE ARTICULATED.

After holding that the information at issue could be disclosed pursuant to the OFCCP regulations, even though it was exempt from mandatory disclosure under the FOIA pursuant to the (b)(4) exemption, the Third Circuit then left the agency and courts reviewing agency action totally adrift. It simply said that a reviewing court must

> "examine whether the agency considered the proper factors in determining that disclosure was permitted under its own disclosure regulations. Under the OFCC disclosure regulations, for example, the contested information in this case could only be disclosed if that agency determined that

disclosure would 'further the public interest and [not] impede the discharge of any of the functions of the OFCC or the Compliance Agencies.' And, as the FOIA exemptions make clear, disclosure of certain types of information will not, in the opinion of Congress, always be in the public interest." 565 F.2d at 1192 (footnote omitted).

A. The Broad Public Policy Of Protecting The Confidentiality Of Competitively Sensitive Information Must Be Given Considerable Weight.

Accepting *arguendo* the soundness of the curious proposition that the congressional intent or "opinion" to "assure" (see p. 9, *supra*) that confidential private information would remain confidential is entitled to something less than controlling weight, the question still remains what weight is to be given that intent or "opinion." At the very least, it would seem that an agency could not justify discretionary release merely by a conclusory assertion that the public interest warrants disclosure. An agency should be required to articulate specifically the overriding public interest factors that it feels are sufficient to offset the congressional desire to protect confidentiality of business information.

Moreover, the broad public policy in favor of disclosure, reflected in the FOIA, clearly does *not* constitute such an overriding public interest factor where private confidential information is at issue. This is because the disclosure at which the FOIA is aimed is essentially the disclosure of government-generated information: The FOIA "provides the necessary machinery to assure the availability of government information necessary to an informed electorate." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 12 (1966). The Congressional objective was "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Department of the Air Force* v. *Rose, supra,* 425 U.S. at 361. *See also National Labor Relations Board* v. *Sears, Roebuck & Co.,* 421 U.S. 132 (1975); S. Rep. No. 813, 89th Cong., 1st Sess. (1965). The purpose of the FOIA, in other words, is "to protect the people's right to obtain information about their *government,* to know what their *government* is doing, and to obtain information about *government* activities and policies." Note, *A Review of the Fourth Exemption of the Freedom of Information Act,* 9 Akron L. Rev. 673, 694 (1976) (emphasis added).[23]

The FOIA was never intended as a vehicle by which all information is to be made available to the public and "was not enacted for the purpose of enabling the public to obtain information about what individuals and corporations are doing, or about what their activities and policies are." *Westinghouse Electric Corp.* v. *Schlesinger, supra,* 542 F.2d at 1210 n.64, *quoting* Note, *supra,* 9 Akron L. Rev. at 694. Further, since "the public's interest in confining the breadth of the [FOIA] exemptions is not equally strong for all nine provisions," an important factor bearing on a decision to release exempt information is whether the requested

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[23] Both the Fourth and Fifth Circuits appear to recognize these important distinctions among the exemptions. *Compare* Continental Oil Co. v. FPC, 519 F.2d 31, 35 (5th Cir. 1975) (rejecting claim of agency discretion to release information within the (b)(4) exemption) *with* Pennzoil Co. v. FPC, 534 F.2d 627, 630 (5th Cir. 1976). *And compare* Westinghouse Electric Corp. v. Schlesinger, *supra,* 542 F.2d at 1197 *with* Charlotte-Mecklenburg v. Perry, 16 FEP Cases 680, at n.15 (4th Cir., January 26, 1978) *and* Westinghouse Electric Corp. v. Brown, *supra,* 443 F. Supp. at 1230.

information relates to "the agency's actions, plans, and policies" as opposed to the "actions, plans, and policies" of private parties. *See Westinghouse Electric Corp.* v. *Schlesinger, supra,* 542 F.2d at 1197; Note, *In Camera Inspections Under the Freedom of Information Act,* 41 U. Chi. L. Rev. 557, 565 (1974).[24]

B. The Character, Purposes And Alternatives Of The Information Requester Have To Be Weighed.

Another important public interest factor would be the demonstrated needs and purposes of the party requesting disclosure. While the FOIA generally entitles any member of the public to access to information as to which disclosure is mandatory, that clearly is not the case where exempt information to which the Act "does not apply" is involved.[25] Obviously when a competitor or possible representative of a competitor is seeking the information, caution in exercising discretion to release

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[24] As one commentor has put it, there is a

> "philosophical distinction between exemption (4) and Government information generally; the general public has no claim to a business' secret or a financial ledger, as it might to a Government-generated highway map or agency interpretative bulletin . . . [T]here is a significant policy justification for not 'giving away for free' what private industry, *not Government* has paid for. Government's duty to reveal *its* inner workings provides no similar justification for the disclosure of private parties' operations." O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act,* 30 Bus. Lawyer 1125, 1134 (1975).

[25] Moreover, where the question is whether to release information as to which the FOIA has been found not to apply, there is no reason to impose a ten-day time limit on an agency's decision-making process. Recognition that 5 U.S.C. § 552(a) (6)(A)(i) does not apply to any discretionary release decision would allow more considered development of agency records and, hopefully, more reasoned agency decision-making.

the private, confidential information would be essential. This would also be true where a requestor, although not a competitor, seeks unrestricted access and opportunity to republish, since such access, particularly in these times of the ubiquitous photocopying machine, is likely to result in the information reaching competitors by indirect means.[26]

Another potential requestor, particularly of information of the type at issue here, is the plaintiff or potential plaintiff in an employment discrimination suit. The motives of such requestors may at first blush seem less suspect than those of the requesting competitor. However, the facts that litigants have broad opportunities to obtain information relevant to their claims through pre-trial discovery, and that the courts have considerably greater expertise in fashioning limitations and conditions on disclosure of sensitive information to protect information suppliers from competitive injury or other misuse of the information, weigh heavily against agency disclosure. *Cf.* Fed. R. Civ. P. Rule 26(c)(7).

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[26] Here too, since the FOIA does not apply where disclosure of exempt information is at issue, there is no bar to agency-imposed limitations or conditions on disclosure such as permitting inspection but not copying. Indeed, when the exempt information is private confidential commercial or financial information, the failure at least to consider something less than unrestricted disclosure would by itself appear to be arbitrary and capricious. But conversely, well-intended conditions on disclosure would not suffice to justify disclosure which would otherwise be imprudent. Unlike a court which retains jurisdiction over litigants to enforce its protective orders, there could be very substantial practical limitations on an agency's ability to enforce conditions which it might place on disclosure, so that great reliance on such conditions to justify disclosure would be arbitrary and capricious.

C. The Impact On The Underlying Regulatory Scheme Must Be Considered.

The Third Circuit seems to endorse the notion articulated in an OFCCP regulation that disclosure of exempt information is proper if disclosure would not "impede the discharge of any of the functions" of the OFCCP. *See* 565 F.2d at 1192. But in view of the congressionally perceived interest in maintaining confidentiality, surely some more positive benefit to agency functions must be found before disclosure can be rationally justified. If, as is conceded, there is a substantial policy factor weighing against disclosure, there must be more than the mere absence of a negative on the other side of the scale. But perhaps in the instant case this distinction is not critical, for it is very difficult indeed to see how the agency, or a court reviewing its action, could possibly conclude that public disclosure of the AAPs and EEO-1s would have any result other than seriously to impede the equal opportunity functions of the agency.

As dictated by Executive Order 11246, OFCCP regulations require government contractors to formulate affirmative action compliance programs, delineating the current work force, the relevant labor availabilities, identifying areas in which the contractor appears to be falling short of the desired ends, and establishing goals and timetables to correct under and over utilization of minorities and females in various job categories. The pertinent regulations are necessarily phrased in general terms and afford contractors significant leeway in setting out their analysis. *See* 41 C.F.R. § 60-1.40; *id.* pt. 60-2. *See also id.* pt. 60-60. Such a regulatory scheme places a premium on candor and critical self-evaluation by contractors in analyzing areas of shortcoming and establishing goals to be met. *See* 41 C.F.R. § 60-2.13. To the extent that contractors are reluctant to be self-critical, the success of the overall program suffers.

The program also depends on a spirit of cooperation and conciliation between the contractor and Compliance Agency. But by opening affirmative action documents otherwise exempt from mandatory disclosure to anyone from the disgruntled employee to the envious competitor and those bent on publicly vilifying the company, the overall objective of affirmative action would be bound to suffer.[27] The government, of course, could still require the compilation of affirmative action plans and attempt to prod contractors into accelerating affirmative action efforts. But clearly the task of government would be more difficult with the inevitable reduction of critical self-evaluation.

Recognizing these very considerations, several district courts have restricted the access of Title VII plaintiffs to affirmative action materials in situations in which an adverse impact on the incentives to self-criticism was apparent. *See Parker* v. *Bell Helicopter Co.*, No. CA 4-75-61 (N.D. Tex., July 12, 1977); *Dickerson* v. *United States Steel Corp.*, 12 E.P.D. ¶ 11,095

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[27] Even with presumed confidentiality vis-a-vis the outside world, management personnel must be encouraged to identify equal employment opportunity shortcomings within their respective spheres of responsibility. The task of insuring that such personnel are self-critical would be rendered much more difficult if it were feared that the raw data thus developed would be made public without the employer having an opportunity to analyze and explain the data in the context of the safeguards provided by an appropriate enforcement proceeding. *Cf.* International Bro. of Teamsters v. United States, 431 U.S. 324, 340 (1977).

(E.D. Pa. 1976); *Sanday* v. *Carnegie-Mellon University,* 12 FEP Cases 101 (W.D. Pa. 1975); *Banks* v. *Lockheed-Georgia Co.,* 53 F.R.D. 283 (N.D. Ga. 1971). As the court in *Sanday* found,

> "in view of the governmental requirements which foster candid reflection and internal evaluation we firmly believe that such policy determinations, while possibly relevant, should not be made available to party litigants for the simple reason that the primary purpose behind such regulations may be destroyed." 12 FEP Cases at 103 (citation omitted).

Possible jeopardy to a regulatory program that has as its basic goal fulfillment of the deep national commitment to equal employment opportunities cannot be brushed aside on the basis of shibboleths about the broad purposes of the Freedom of Information Act.

III. THE THIRD CIRCUIT ERRED IN CONCLUDING THAT THE DISTRICT COURT CANNOT DETERMINE *DE NOVO* THE APPLICABILITY OF FOIA EXEMPTIONS.

In conformity with all other lower courts considering the question, the Third Circuit found that the private provider of information may bring an action to prevent government disclosure that is threatened in the usual case by way of a response to a third party's FOIA request. The Court of Appeals correctly held that subject matter jurisdiction in these so-called reverse FOIA lawsuits is based upon 28 U.S.C. § 1331. *See* 565 F.2d at 1182; *Califano* v. *Sanders,* 430 U.S. 99 (1977); *Planning Research Corp.* v. *Federal Power Commission,* 555 F.2d 970 (D.C. Cir. 1977); *Sears, Roebuck & Co.* v. *General Services Administration,* 553 F.2d 1378 (D.C. Cir.), *cert. denied,* ——U.S.—— (No. 76-1642, 1977).

Although it concluded that Congress was concerned that "disclosure of certain information might injure interests in privacy or confidentiality which may be as important as the public's right to general access to agency information," that "disclosure of submitter information is qualitatively different from disclosure of data directly relating to government operations," and that the interest in privacy appears "stronger with respect to the former than the latter," 565 F.2d at 1184, the Third Circuit nevertheless found that a provider of information has no right to a judicial determination *de novo* as to whether documents are subject to mandatory disclosure under the FOIA. Instead, the Court of Appeals concluded that the only cause of action an information provider had standing to raise was one for judicial review under the APA, and that the scope of that judicial review is limited to the hurriedly compiled and therefore usually inadequate administrative record [28] as to whether the decision to disclose was arbitrary, capricous or an abuse of discretion. 565 F.2d at 1190-93.

A. The Third Circuit's Doctrinal Justifications For Rejecting A Trial De Novo Are Unpersuasive.

The Third Circuit rejected the notion of a *de novo* determination of the claims of a reverse-FOIA plaintiff on the basis of a tidy but unsound syllogism: there is no implied cause of action for the information provider under the FOIA, because the FOIA exemptions are merely permissive, or under 18 U.S.C. § 1905, be-

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[28] The FOIA requires that an agency determine within ten working days whether to comply with a request under the Act. 5 U.S.C. § 552(a)(6)(A)(i). Any administrative appeal is to be determined within twenty working days. *Id.* § 552(a)(6)(A)(ii).

cause it is a criminal statute, therefore only the APA provides a cause of action, and the general rule under the APA is that court review is limited to the agency record. The unsoundness of the syllogism is in its premises.

The notion that each of the nine FOIA exemptions is "merely permissive," in the sense that each allows but does not require nondisclosure, is wrong. The (b)(4) exemption, as has been seen, was intended to *assure* nondisclosure of a private party's trade secrets and confidential financial or commercial information. Moreover, the (b)(3) exemption, as amended in 1976, incorporates nondisclosure statutes that either (a) *require* that matters be withheld "in such a manner as to leave no discretion on the issue" or (b) establish criteria for withholding or refer to particular types of matters to be withheld. Certainly the (b)(3) exemption is anything but merely permissive.

Furthermore, although the Third Circuit refused to address the issue, even though it was raised by the parties, 18 U.S.C. § 1905 would seem clearly to be one of the statutes incorporated in the (b)(3) exemption. Section 1905 plainly meets the requirements of both provisos of the (b)(3) exemption.[29] It satisfies the first proviso because it does not provide for any administrative discretion to disclose documents that fall

[29] Since the two provisos of the (b)(3) exemption are clearly disjunctive, a statute to be incorporated by the exemption need only satisfy one proviso or the other. American Jewish Congress v. Kreps, No. 76-1559, Slip Op. at 8 (D.C. Cir., March 15, 1978); Irons v. Gottschalk, 548 F.2d 992, 994 n.3 (D.C. Cir. 1976); Note, The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act, 76 Colum. L. Rev. 1029, 1041-42 (1976).

within its scope.[30] Section 1905 also satisfies the second proviso because it specifies the particular types of matters that may not be disclosed, such as trade secrets, processes, operations, confidential statistical data, and so forth.

Several lower court decisions conclude that the (b)(3) exemption incorporates Section 1905.[31] The District of Columbia Circuit, which had initially reached the contrary conclusion,[32] recently re-evaluated its position and declared the issue open in light of the 1976 amendment of Exemption 3.[33] The lower court decisions holding that Section 1905 is not a (b)(3) statute[34] appear to have put misplaced reliance on a

[30] Indeed, since Section 1905 is a criminal statute, it could have no discretionary element. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 168-69 (1972); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

[31] Westinghouse Electric Corp. v. Schlesinger, *supra*, 542 F.2d at 1199-1203; Holiday Inns, Inc. v. Kleppe, 13 FEP Cases 1337 (W.D. Tenn. 1976); General Dynamics Corp. v. Dunlop, 427 F. Supp. 578 (E.D. Mo. 1976), *rev'd on other grounds sub nom.* General Dynamics Corp. v. Marshall, 16 FEP Cases 898 (8th Cir., February 14, 1978); Babcock & Wilcox Co. v. Rumsfeld, 70 F.R.D. 595, 600 n.8, 601 (N.D. Ohio 1976).

[32] *See* Charles River Park "A", Inc. v. HUD, *supra*, 519 F.2d at 941 n.7.

[33] Sears, Roebuck &Co. v. GSA, *supra*, 553 F.2d at 1385:

> "The threshold issue now is whether § 1905 is within the now more limited group of statutes described by exemption 3. On this the Supreme Court may speak; lacking decisive new guidance by the Supreme Court, the District Court is free to reconsider its view in light of all that has taken place subsequent to its original decision."

[34] Westinghouse Electric Corp. v. Brown, *supra*, 443 F. Supp. at 1232; Metropolitan Life Ins. Co. v. Usery, *supra*, 426 F. Supp. at 158; Crown Central Petroleum Corp. v. Kleppe, 424 F. Supp. 744, 752-53 (D. Md. 1976).

bit of legislative history discussing a quite different (b)(3) amendment from that finally adopted in 1976.[35] Subsequently, the amendment was successively broadened to include statutes that *either* required information to be withheld *or* that permitted withholding but only when such permissive statutes confined the administrator's discretion by giving particular criteria for withholding or by referring to particular types of documents to be withheld.[36] With one clarifying addition in conference, this was the version of the amended exemption finally enacted into law.[37]

Nothing in the legislative history dealing with the final form of the (b)(3) amendment, such as the Conference Report or the floor discussion prior to adoption of the Conference Report,[38] suggests approval of the House Committee on Government Operations' position

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[35] H.R. Rep. No. 94-880, 94th Cong., 2d Sess., Part I, 23 (1976). At that time the proposed amendment read:

> "(3) required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information."

[36] The version as finally passed by the House read:

> "(3) specifically exempted from disclosure by statute (other than Section 552b of this Title) provided that such statute (A) requires that the matters be withheld from the public, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 122 Cong. Rec. H7897 (daily ed. July 28, 1976).

[37] The phrase "in such a manner as to leave no discretion on the issue" was added to clarify the meaning of proviso (A). 122 Cong. Rec. H7896 (daily ed. July 28, 1976); 122 Cong. Rec. H9260 (daily ed. August 31, 1976).

[38] H.R. Rep. No. 1441, 94th Cong., 2d Sess. 14 (1976); 122 Cong. Rec. H9260 (daily ed. Aug. 31, 1976); 122 Cong. Rec. S15044 (daily ed. Aug. 31, 1976).

with respect to Section 1905. Instead, the remarks of the sponsor of the House floor amendment, Congressman McClosky, indicate that the intent was to include within the exemption generally worded, nondiscretionary confidentiality statutes, which he believed had been unwisely excluded by the proposal of the House Committee on Government Operations and even by the House Judiciary Committee version, in addition to discretionary nondisclosure statutes which set out sufficient criteria to guide the administrator's discretion.[39]

If, as seems likely in view of the foregoing analysis, 18 U.S.C. § 1905 is found to be incorporated by reference in the (b)(3) exemption, a civil statute, the Third Circuit's reluctance to find an implied civil cause of action solely on the basis of a criminal statute must diminish in importance.

In any event, the lower court's reliance on the APA to avoid the conceptual problems it perceived with finding a cause of action in any other statute does not produce the intended result. The provision of the APA on which the Third Circuit relied, 5 U.S.C. § 702, gives

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[39] 122 Cong. Rec. E4187-89 (daily ed. July 29, 1976); 122 Cong. Rec. H7897-98 (daily ed. July 28, 1976), E4148 (daily ed. July 28, 1976). *Accord*, American Jewish Congress v. Kreps, *supra*, Slip Op. at 7-12; Note, The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act, 76 Colum. L. Rev. 1029, 1042-43 (1976).

The two statutes listed in the Conference Report as illustrative of statutes not incorporated in the amended Exemption 3 are totally dissimilar to Section 1905. Both Section 1104 of the Federal Aviation Act of 1958, 49 U.S.C. § 1504, and Section 1106 of the Social Security Act, 42 U.S.C. § 1306, give the respective agency broad discretion to make disclosure decisions and do not identify particular types of documents to be withheld or give the administrator any guidance as to how to exercise his discretion to disclose.

standing to seek review to persons suffering a "legal wrong" or who are adversely affected "within the meaning of a relevant statute"; accordingly, there must also be some separate statutory or judicially conferred right beyond Section 702 to justify judicial review.[40] Although the Third Circuit failed to identify that separate legal right, the answer must be found in the FOIA, Section 1905 or some other provision overlooked by the Third Circuit.[41]

B. Doctrinal Niceties Aside, *De Novo* Determinations Of The Claims Of Information Providers As To The Applicability Of FOIA Exemptions Are Both Necessary And Practical.

Limiting the scope of a reverse FOIA lawsuit to a review of the agency's decision based exclusively on the agency record effectively strips private information providers of the protection Congress sought to afford to them through the (b)(4) and (b)(6) exemptions. To be sure, Congress did not specify in the FOIA itself how the confidential commercial and privacy interests identified in those exemptions were to be protected. Perhaps Congress assumed—mistakenly as it

[40] *See, e.g.*, Rasmussen v. United States, 421 F.2d 776 (8th Cir. 1970); Cobb v. Murrell, 386 F.2d 947 (5th Cir. 1967); Braude v. Wirtz, 350 F.2d 702 (9th Cir. 1965); Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir. 1955).

[41] In reaching its APA conclusion the Court of Appeals appears to have relied entirely on the government's belated assertion that 5 U.S.C. § 702 applied because "a submitter may be '[a] person suffering legal wrong because of agency action . . . within the meaning of a relevant statute.' " 565 F.2d at 1190. The government originally contended that 5 U.S.C. § 701 precluded *any* judicial review of the intended government disclosure, but abandoned that most extreme position after the filing of its brief with the Third Circuit. *Id.* at 1175.

now turns out—that agencies would protect confidential private data and the rights of information submitters as zealously as they defended their own interests and their own data. In any event, Congress did not focus upon the fact that an agency, seeing no interest of its own in protecting the material and faced with the prospect of litigation by the FOIA requester, will often opt to release the material instead of devoting the resources necessary to make a considered, individualized examination of the requested documents and defend a decision to assert the exemption.[42]

[42] The FOIA has placed significant demands on agency resources. *See* Hearings on Business Record Exemption of the Freedom of Information Act Before Government Information and Individual Rights Subcommittee of House Committee on Government Operations, 95th Cong., 1st Sess. 73 (1977) ("1977 House Hearings") (FDA invests 67 person-years and $1.8 million annually in FOIA administration); *id.* at 8 (EPA handled 3,352 FOIA requests in fiscal 1976); 1977 Department of Justice Freedom of Information Act Report to Congress (submitted April 18, 1978) (estimated 1.07 million manhours spent on FOIA and Privacy Act activities at a cost of over $12.95 million).

These demands on the agencies were exacerbated by the 1974 Amendments to the FOIA (which imposed the ten-day deadline for agency decisions on FOIA requests) and coincidentally by a significant 1974 judicial interpretation of the Act that creates significant disincentives to agency vindication of (b)(4) and (b)(6) interests. The evaluation, for example, of a (b)(4) exemption claim, in light of the "substantial competitive injury" test first articulated in National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), often requires the agency to resolve factual questions in areas where it has little or no expertise.

The 1974 Amendments also directed that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." The lower courts have implemented this provision by requiring detailed explanations on agency implementation of the requirement. *See, e.g.*, Mead Data Central, Inc. v.

In any event, agencies have failed to vindicate the rights accorded private interests by the (b)(4) and (b)(6) exemptions. Thus, private information providers have been forced to initiate judicial action—where they have had a chance to do so[43]—to protect their

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Department of the Air Force, 556 F.2d 242, 261 (D.C. Cir. 1977), where the lower court allowed that:

> "Certainly these procedures add significantly to the resource costs an agency must bear if it chooses not to disclose material it has in good faith decided is exempt. Those burdens may be avoided at the option of the agency, however, by immediate disclosure. Congress has encouraged the agencies to disclose exempt material for which there is no compelling reason for withholding, and an agency's own balancing of the resource costs of justifying non-disclosure against the value of secrecy may provide a rough estimate of how compelling is its reason for withholding."

The attractiveness of avoiding these procedures by disclosure in (b)(4) and (b)(6) situations, where the agency perceives no interests of its own in withholding, is obvious.

[43] An information provider's ability to take timely action to protect its rights is often difficult since the FOIA contains no provision that a submitter receive notice from an agency before its documents are disclosed. While a few agencies do provide for notice to submitters in their regulations implementing the FOIA, *e.g.*, 32 C.F.R. § 286.11(d)(4)(ii) (Department of Defense), a significant number of agencies do not. *See, e.g.*, 28 C.F.R. Part 16 (Department of Justice); 24 C.F.R. Part 15 (Department of Housing and Urban Development); 49 C.F.R. Part 7 (Department of Transportation); 31 C.F.R. Part 7 (Treasury Department); 5 C.F.R. Part 294 (Civil Service Commission). Other agencies only provide notice in what they consider to be close questions on the applicability of the (b)(4) exemption or when it is administratively feasible to do so. *See, e.g.*, 40 C.F.R. § 2.203 and 2.204(d)(1)(i) (Environmental Protection Agency); 43 C.F.R. § 2.13(h) (Department of Interior); 21 C.F.R. § 4.45 (Food and Drug Administration). The OFCCP does not provide notice but directs that a government contractor must demonstrate at the time the government takes possession of the documents why the information is not subject to disclosure pursuant to the FOIA. 41 C.F.R. § 60-60.4(d). Yet, some Compliance Agencies do not follow this regulation and refuse to permit government contractors to make a showing of confidentiality at the time documents are submitted to the agency. The Defense Supply Agency, the Compliance Agency involved in this case, has taken this approach, claiming that review of a confidentiality claim at the time of document submission is too burdensome administratively. Defense Supply Agency Memorandum DSAH-G, dated 17 December 1974, to Commander Defense Contract Administration Services Region, concerning "Release of Contract Compliance Data Under the Freedom of Information Act." J.A. 973-76. Moreover, the DSA has also directed it would not delay disclosure because a contractor wished to contest a decision at the time of the request. Defense Supply Agency Memorandum DSAH-G, 1820-75, AIC 7817, dated 18 Feb. 1975, to Counsel, concerning "Release of Compliance Data Under Freedom of Information Act Amendments." J.A. 977-78.

interests." The Third Circuit, however, by limiting the information provider to whatever agency record that may have been compiled, makes it virtually impossible

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[44] To be sure, Congress has attempted to protect personal privacy further by enactment of the Privacy Act of 1974. 5 U.S.C. § 552a (Supp. 1976). That Act, however, protects only information that is retrievable by an individual's name or other identifying characteristic. *See* 5 U.S.C. § 552a(a)(5) and § 552a(b). Consequently, the reverse FOIA lawsuit is the only available judicial remedy for many types of information protected by the (b)(6) exemption. AAPs, for example, often include information concerning individual employees' salaries, evaluations of work performance, prospects for promotions and other subjects, disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Metropolitan Life Ins. Co. v. Usery, *supra;* Sea-Land Service, Inc. v. Morton, 11 EPD ¶ 10,792 (D.D.C. 1976); Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292 (C.D. Cal. 1974), *appeal pending* No. 75-1064 (9th Cir.). The lower courts have uniformly permitted a corporate supplier of information to assert the privacy interests of its employees. *See* Sears, Roebuck & Co. v. GSA, 553 F.2d 1378 (D.C. Cir.), *cert. denied*, —— U.S. —— (No. 76-1642, 1977); Westinghouse Electric Corp. v. Brown, *supra;* Metropolitan Life Ins. Co. v. Usery, *supra;* Sea-Land Service, Inc. v. Morton, *supra;* Hughes Aircraft Co. v. Schlesinger, *supra; cf.*, Robertson v. Department of Defense, 402 F. Supp. 1342 (D.D.C. 1975); *accord,* Comment, The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1964, 11 Harv. Civ. Rights-Civ. Libs L. Rev. 596, 620 n.110 (1976).

to vindicate the rights which the (b)(4) and (b)(6) exemptions are intended to protect.

The deference traditionally accorded to administrative decision-making grows out of a presumption that agencies charged with the administration of particular regulatory programs possess greater expertise to adjudicate the relevant issues involved than a court of general jurisdiction. *See e.g., Federal Power Commission* v. *Florida Power & Light Co.*, 404 U.S. 453 (1972); *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953); *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947). That presumption does not apply in a reverse FOIA situation. There is rarely any agency expertise in the determination of whether disclosure of privately submitted information might afflict substantial competitive harm on the information provider; agency officials themselves recognize their inability to determine effectively claims of competitive injury.[45] Thus, even

[45] As an Environmental Protection Agency official has described the problem to Congress,

> [the substantial competitive harm test] is a factual determination, as well as a legal one, and it calls on the Agency to make prospective judgment. As I noted above, however, the Agency seldom has much information with which to make this judgment. EPA does receive the substantiation from the affected business in which the business makes its case as to whether there would be substantial competitive harm and what the harm would be. But EPA is at a disadvantage because it cannot test the validity of the business' assertions without specialized knowledge of the business or the particular industry. This is information that EPA seldom has. 1977 House Hearings at 5.

Support for the "substantial competitive harm" test appears lacking from the legislative history of the (b)(4) exemption. *See* notes 8-10 *supra* and accompanying text; Patten & Weinstein, Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations, 29 Ad. L. Rev. 193, 195-98 (1977).

without the disincentives to agency vindication of (b)(4) rights noted above, agencies do not possess any particular expertise to decide the factual and legal issues involved.

The inadequacy of procedure contemplated by the Third Circuit is underscored by the fact that the compilation of the agency record is limited to the ten-day period imposed by the FOIA upon the agency to respond to an FOIA request. 5 U.S.C. § 552(a)(6)(A)(i). The ten-day limit was imposed by Congress in 1974 because agencies were conducting in response to the FOIA "stubborn, protracted trench warfare, yielding nothing except under compulsion." 120 Cong. Rec. H10870 (daily ed. Nov. 20, 1974) (remarks of Cong. Aspin); *see* H.R.Rep. No. 93-876, 93d Cong., 2d Sess. 6 (1974) ("information is often useful only if it is timely"); S. Rep. No. 93-584, 93d Cong., 2d Sess. 3 (1974) (discussing "delays of epidemic proportion"). While the ten-day limitation puts an end to administrative intransigence, or ought to, it also imposes a virtually insurmountable burden on the information provider (even if notice of the FOIA request is received within the ten-day period to present to the agency the case for nondisclosure), and on the agency to make its determination within ten days. Of course, at the time of the 1974 Amendments to the FOIA, the additional burdens which the (b)(4) exemption test announced in the *National Parks* decision imposed on

Of course, if it were determined that 18 U.S.C. § 1905 is incorporated in the (b)(3) exemption, the issues would be simplified; it would only be necessary to show that the data are of the type that Section 1905 protects. But even with respect to this simpler inquiry few if any agencies can claim expertise as to whether the information is treated as confidential by the supplier.

the agencies were not yet fully appreciated. But now, as one witness at recent Congressional oversight hearings put it:

> "It is virtually impossible to think of a procedure whereby everyone's views could be obtained and an agency determination reached within ten days." 1977 House Hearings at 41 (Statement of Professor Nancy Duff Campbell).

Quite simply, the agencies have been unable to discharge their obligations properly under these procedures. For example, the EPA admitted at the 1977 House Hearings that the ten-day limit provided no time to evaluate the issues in a (b)(4) situation and thus it automatically issued an initial denial to the FOIA requester whenever a possibility existed that (b)(4) material was involved. 1977 House Hearings at 4. In the instant case, the agency decided that the ten-day limit overrode Chrysler's right (contemplated by the OFCCP's own regulations) to an administrative review of the initial decision to release the data at issue. (J.A. 992-93.) Perhaps the most candid agency assessment on the impact the ten-day limit has on the rights of information submitters was made by the Securities and Exchange Commission in altering its FOIA regulations:

> "The Commission regrets that in many cases the Commission will disclose records although persons who cooperated in its investigation would have reasonable grounds to object, either because of personal privacy or business secrecy considerations. But the stringent time requirements under the Freedom of Information Act, as amended, as well as the heavy financial and manpower burden that the Commission would be obliged to sustain if it were to attempt to examine each individual record for these purposes, will generally prevent the Commission from refusing to make disclosure on these bases." SEC Release No. 33-5571, 40 Fed. Reg. 8797, 8799 (March 3, 1975).

Further, the FOIA does not require agency findings or even that the agency consider the information provider's submission. Coupled with the ten-day limits, these factors virtually insure that there will be little, if any, administrative record to review by the court.

The inability of agencies to deal meaningfully with the complex legal and related factual issues posed by reverse FOIA claims is illustrated by the Third Circuit's decision itself.[46] While wishing to restrict review to the administrative record, the Third Circuit felt compelled to admit that the

> "agency record is so ambiguous that it is impossible to determine whether the decision of DSA to disclose the contested information is mandated by the FOIA or is in the public interest and thus permissible under that agency's own disclosure regulations." 565 F.2d at 1192.

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[46] The Third Circuit's decision appears to have been partially motivated by a desire to relieve the perceived burdens of the reverse FOIA cases from the courts. Yet the Court of Appeals' rejection of *de novo* review will not reduce the reverse FOIA caseload at all, since APA review remains available. Moreover, when removed from the ten-day deadline from request to decision, a (b)(4) claim will not require an inordinate devotion of judicial resources. The typical FOIA (b)(4) case has proven relatively straightforward and of short duration. Even under the "substantial competitive harm" test, the lower courts have recognized that "detailed economic evidence" is not required, that "no actual adverse effect on competition need be shown," and that the decision on mandatory disclosure could be based "at least in part on relevant and credible opinion testimony." National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 681, 683 (D.C. Cir. 1976).

It also saw the need to remind District Courts of the responsibility for *pendente lite* intervention under 5 U.S.C. § 705 which would necessarily entail mini-reverse FOIA trials, presumably *de novo* in view of the *absence* at that time of a completed record.

The Eighth Circuit, in following the Third Circuit's approach, also had to find the agency record inadequate in that it failed to disclose the bases for various determinations so that the agency's disclosure decision could not be sustained. *General Dynamics Corp.* v. *Marshall,* 16 FEP Cases 898 (8th Cir., February 14, 1978). Clearly the inevitable result of the Third Circuit's approach will be the practical impossibility for an agency to compile a record and make a determination within the ten-day period which can withstand even the judicial review the Court of Appeals contemplates.

In contrast to the Third Circuit's approach, the District of Columbia and Fourth Circuit have effectuated the congressional protections of the (b)(4) and (b)(6) exemptions by providing for *de novo* judicial consideration of the mandatory disclosure issue. In *Charles River Park "A", Inc.* v. *Department of Housing and Urban Development, supra,* 519 F.2d at 940 & n.4, the Court of Appeals directed the District Court to hold an evidentiary hearing and determine *de novo* whether the information in question fell within the (b)(4) exemption. The D.C. Circuit recognized that this hearing "would not be a *de novo* evidentiary hearing on the facts constituting the basis for the agency's decision. Such a hearing would not, of course, be appropriate under *Camp* v. *Pitts,* 411 U.S. 138, 93 S. Ct. 1241, 36 L. Ed. 106 (1973)." Instead the D.C. Circuit said

> "A plaintiff in a suit such as this is obviously entitled to no relief if the government could be forced to disclose the information it wishes to reveal in a suit under the FOIA. Thus, the district court should hold a hearing to determine whether the information involved here would have been exempt just as it would if a suit had been brought under the FOIA to compel disclosure. *See* 5 U.S.C. § 552(b)(3); *National Parks and Conservation Association* v. *Morton* [498 F.2d 765 (D.C. Cir. 1974)]. In holding this hearing the district court is not reviewing agency actions; it is making a threshold determination whether the plaintiff has any cause of action at all." 519 F.2d at 940-41 n.4.

See also Sears, Roebuck & Co. v. *General Services Administration, supra,* 533 at 1380-81; *Planning Research Corp* v. *Federal Power Commission, supra,* 555 F.2d at 977 n.17.[47]

The Fourth Circuit, recognizing the disincentives to agency protection of submitter rights and the lack of agency expertise in this area, has implied a *de novo* cause of action under the (b)(4) exemption to the FOIA on a somewhat different but no less sound basis:

> "Moreover, there is always the real risk that the agency itself will be delinquent in asserting the rights of the private party. After all, it could not care less about protecting the competitive position of a supplier of information. That is no part of its responsibility. Neither does it have, as has already been observed, in most instances, sufficient knowledge to assert properly the private party's right

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[47] Just as a court always reserves the right to determine *de novo* the facts relevant to subject matter jurisdiction, *see* Wright & Miller, Federal Practice & Procedure, § 1350, the D.C. Circuit's approach to the instant problem is consistent with the norms of judicial oversight of administrative action.

to confidentiality. And it must not be forgotten that the protection of a competitive position is both a valuable and often complex matter, dependent upon full proof, and one 'basic to our free enterprise system.' Should not the person who is threatened with harm through a disclosure, which the Congress has indicated clearly is against the public policy as expressed in the FOIA itself, be the proper one to assert that right to protection from disclosure assured him under Exemption 4, in an equity action in which he can have a *de novo* trial? The envious competitor or the curious busybody demanding access to that private information has the right to such a *de novo* trial. The Act gives it to him. But is not the same right to be implied, when the supplier, with a right that Congress gave him 'not only as a matter of fairness but as a matter of right,' seeks what may be regarded as a correlative relief?' " *Westinghouse Electric Corp.* v. *Schlesinger*, 542 F.2d 1190, *supra*, at 1213 (footnote omitted).[48]

The decisions of the Fourth and District of Columbia Circuits implying a private cause of action under the FOIA are not at odds with the factors delineated in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), relevant to the determination whether a private remedy is implicit in a statute not expressly providing one.[49] The FOIA

[48] Several District Courts in still other circuits have also found that a *de novo* inquiry is appropriate in reverse FOIA cases. *See* Sonderegger v. Dep't of the Interior, 424 F. Supp. 847 (D. Idaho 1976); Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292 (C.D. Cal. 1974), *appeal pending*, No. 75-1064 (9th Cir.).

[49] In *Cort* v. *Ash* the Court explained that:

> "In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' Texas & Pacific R. Co. v. Rigsby, 241 U.S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? *See, e.g.*, National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers, 414 U.S. 453, 458, 460 (1974) (Amtrak). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? *See e.g.*, Amtrak, *supra:* Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 423 (1975); Calhoon v. Harvey, 379 U.S. 134 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" 422 U.S. at 78.

We do not believe the Court has ever indicated that total compliance with each of these standards is a prerequisite to implying a private cause of action; they are rather a series of factors to be considered together.

[50] The Seventh Circuit has recently reached a contrary conclusion in determining whether an implied cause of action under the FOIA meets the *Cort* v. *Ash* test. Sears, Roebuck & Co. v. Eckerd, 17 FEP Cases 436 (7th Cir., April 25, 1978). That analysis errs

exemptions are not "bare criminal statutes." *Id.* at 80. The information submitter is certainly one of the class for whose especial benefit the (b)(4) and (b)(6) exemptions were enacted. While, as explained above, there is little indication of legislative intent to create a private action, there is no indication of legislative intent, explicit or implicit, to deny a private remedy. However, it is consistent with the purpose of the (b)(4) and (b)(6) exemptions to imply a private cause of action for the information provider; and it is essential to do so if any meaningful protection is to be accorded the confidentiality interests of the information provider. Finally, a cause of action seeking a determination that private data in the possession of a federal agency are not subject to mandatory disclosure pursuant to the FOIA is certainly not one traditionally relegated to state law.[50]

Hence, the Third Circuit's holding on *de novo* review should be reversed.[51] A private information submitter should be afforded a *de novo* judicial determination whether his or her data are subject to mandatory disclosure under the FOIA.

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on two counts—(1) by ignoring that the FOIA and its exemptions represent a balancing of interests and not a desire for wholesale disclosure of every scrap of paper in the Government's possession and (2) by an unrealistic reliance on the adequacy of limited APA review to protect the rights of the information submitter.

[51] The Third Circuit placed significant reliance in reaching its conclusion that *de novo* review was not available on its view that the FOIA exemptions were permissive, not mandatory, 565 F.2d at 1184-86. Yet the D.C. Circuit, while viewing the exemptions as permissive, has consistently ruled that a *de novo* judicial determination on the mandatory disclosure issue is available. *See, e.g.*, Sears, Roebuck & Co. v. GSA, *supra;* Charles River Park "A", Inc. v. HUD, *supra*. Thus, a mandatory-permissive dichotomy provides no legal basis to abridge the right of a private submitter to have the exemptions enacted for his protection applied correctly to information in which he has confidential commercial or privacy interests.

CONCLUSION

For the reasons stated, the Third Circuit decision should be reversed and remanded with instructions to affirm the decision of the District Court.

Respectfully submitted,

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June, 1978